Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1994

ANDREW C. KURINSKY, JR., DONNA A. KURINSKY, and KATHERINE A. KURINSKY, a Minor,

Petitioners,

vs.

UNITED STATES OF AMERICA, and JOSEPH L. RAMSAK, WILLIAM D. HANN, BARRY GUMMOW, BION ST. BERNARD, KEVIN D. BURNETT, DAN ELVEN ESTREM, GARY L. HALL, ALBERT L. McGINTY, JR., JAMES M. OWENS, LANCE R. SAKURADA, and JAMES J. WHITE, individually and as Special Agents of the Federal Bureau of Investigation,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether, rather than following the rule used in civil rights actions brought under 42 U.S.C. § 1983, in which state statutes of limitations are borrowed pursuant to 42 U.S.C. § 1988, this Court should recognize a uniform, four-year federal common-law rule of limitation for the bringing of a *Bivens*-type action, on consideration of the fact that a *Bivens*-type action implicates only federal interests in that such an action is directed against federal officers for claimed deprivation of federal constitutional rights, and the further fact that in its enactment of 28 U.S.C. § 1658, Congress has established a national policy by declaring that four years is the appropriate statute of limitations for federal civil causes of action created by Congress for which no correlative statute of limitations is otherwise provided.

II. Whether, if a federal common-law rule of limitation for a *Bivens*-type action is not recognized by this Court, then, upon application of *Wilson v. Garcia*, 471 U.S. 261 (1985), and *Owens v. Okure*, 488 U.S. 235 (1989), the mandated statute of limitations for a *Bivens*-type action brought in a federal district court in Ohio is four years, as provided by Ohio Revised Code § 2305.09(D), which pertains to actions for damages for injury to the rights of plaintiff not otherwise enumerated in any other Ohio statute of limitations and is,

therefore, Ohio's general personal injury statute of limitations, rather than two years as determined by the Court of Appeals for the Sixth Circuit by reason of its reliance on Ohio Revised Code § 2305.10, which provides a two-year statute of limitations for actions to recover damages for bodily injury.

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In The
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October Term, 1994

ANDREW C. KURINSKY, JR., et al.,

Petitioners,

-vs-

UNITED STATES OF AMERICA, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Andrew C. Kurinsky, Jr., Donna A. Kurinsky, and Katherine A. Kurinsky, petitioners, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on August 26, 1994.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit reversing in part and affirming in part the order of the United States District Court for the Northern District of Ohio is reported at 33 F.3d 594, and is reproduced in the appendix at A-1.

The memorandum opinion and order of the United States District Court for the Northern District of Ohio is reproduced in the appendix at A-17.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered August 26, 1994. Respondent United States of America's motion for rehearing was denied by order of the United States Court of Appeals for the Sixth Circuit entered November 1, 1994. A-34. This Court has jurisdiction, pursuant to 28 U.S.C. § 1254(1), which provides for review of the judgment rendered by the United States Court of Appeals for the Sixth Circuit in this case, by grant of a petition for a writ of certiorari.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourth and Fifth Amendments to the United States Constitution, 28 U.S.C. § 1658, 42 U.S.C. § 1988,

and Ohio Revised Code §§ 2305.09(D) and 2305.10 are involved in this case. The statutes are set out in the appendix at A-36.

STATEMENT OF THE CASE

This case arises upon a six count complaint filed by petitioners, Andrew C. Kurinsky, Jr., Donna A. Kurinsky, and Katherine A. Kurinsky, a minor, in the United States District Court for the Northern District of Ohio on October 29, 1992. Counts I, II, and III asserted claims brought under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346(b) and 28 U.S.C. §§ 2671, *et seq.*, against the United States for damages resulting from injury to the persons of petitioners and destruction of their property, in part arising out of the search of their business premises, and the seizure and handling of their property by F.B.I. agents on March 29, 1989, in the execution of a search warrant. Petitioners' property was ultimately placed in storage and detained by the F.B.I. until some, but not all of it, was returned to petitioners in damaged condition more than a year-and-a-half after the search and seizure, without an indictment or information ever having issued against petitioners.

Counts V and VI of the complaint were *Bivens*-type claims[1] brought against twelve individually named F.B.I. agents,[2] the individual respondents in this petition, who were alleged to have acted negligently and maliciously toward petitioners in the investigation and in the execution of the search warrant and the seizure and detention of petitioners' property, for which petitioners suffered injuries, all in violation of their Fourth and Fifth Amendment rights.

The District Court's jurisdiction of the FTCA claims was predicated on 28 U.S.C. § 1346(b), and the *Bivens* claims were within the District Court's jurisdiction under 28 U.S.C. § 1331, being claims arising under the Fourth and Fifth Amendments to the United States Constitution.

On separate motions brought by the United States pursuant to Fed. R. Civ. P. 12(b)(1), and by the F.B.I. agents as a group, for dismissal of the complaint pursuant to Fed. R. Civ. P. 12(b)(1) and (6) or, in the alternative, for summary judgment under Fed. R. Civ. P. 56(b), the District Court found that the FTCA claims were barred by the exception to the Act's waiver of

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[1] *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

[2] The claim against one agent was abandoned in the district court.

sovereign immunity contained in 28 U.S.C. § 2680(c) and dismissed the complaint against the United States.

The District Court dismissed the *Bivens* claims upon a finding that they were not brought within the two year limitations period for the bringing of a *Bivens* action as established by the Sixth Circuit in *Friedman v. Estate of Presser*, 929 F.2d 1151 (6th Cir. 1991), in which the Sixth Circuit followed its decision in *Browning v. Pendleton*, 869 F.2d 989 (6th 1989) (*en banc*). In *Browning v. Pendleton*, the Sixth Circuit, construing *Owens v. Okure*, 488 U.S. 235 (1989), held that Ohio's two-year statute, Ohio Rev. Code § 2305.10, applied to an action brought under 42 U.S.C. § 1983.

On appeal from the District Court's orders, the United States Court of Appeals for the Sixth Circuit held that the exception to the FTCA contained in 28 U.S.C. § 2680(c) that was relied upon by the Government and applied by the District Court was not applicable on the facts in this case and reversed the District Court's dismissal of petitioners' claims against the United States.

With regard to the *Bivens* claims, however, the Court of Appeals panel found that it was precluded from applying Ohio's four-year general personal injury statute of limitations, Ohio Rev. Code § 2305.09(D), as petitioners urged was mandated by *Owens v. Okure*, because another panel in *Friedman v. Estate of Presser*, *supra*, had held Ohio's two-year statute applied. Under

a decisional rule of the Sixth Circuit in *Salmi v. Secretary of Health and Human Servs.*, 774 F.2d 685, 689 (6th Cir. 1985), a subsequent panel cannot overrule a decision announced by another panel on the same issue. The panel, therefore, affirmed the District Court's order dismissing the complaint against the respondent F.B.I. agents. The Sixth Circuit panel indicated, however, that even if it were disposed to consider favorably the merit of petitioners' argument, the panel was, for the reason stated, prevented from doing so, and appeared to invite petitioners to seek *en banc* review of the issue. App. A-15, 33 F.2d at 599. Petitioners so moved the court. Their motion, however, was denied. App. A-34.[3]

Petitioners seek review by writ of certiorari from this Court.

STATEMENT OF THE FACTS

Petitioners' own and have operated since prior to March 29, 1989, a business situated in Maple Heights,

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[3] Respondent United States of America also moved for rehearing and suggested *en banc* review of the FTCA issue, but rehearing before the panel and *en banc* review was denied. App. A-34.

Ohio, known as Arcade Sound,[4] which manufactures, recycles, repairs and distributes cable television equipment and related electronic equipment.

The Federal Bureau of Investigation conducted a long-term investigation and surveillance of petitioners' business in connection with a criminal investigation of petitioner Andrew Kurinsky undertaken with the assistance of the National Cable Television Association. The predicate of the investigation was Andrew Kurinsky's suspected violation of Title 47, United States Code, § 553(a)(2) (Unauthorized Reception of Cable Service), and Title 18, United States Code, § 1343 (Wire Fraud).

On or about March 27, 1989, respondent Joseph L. Ramsak, a special agent of the F.B.I. ("Ramsak"), set out the results of the F.B.I.'s investigation in an affidavit and application for a search warrant he presented to a Magistrate Judge for the United States District Court for the Northern District of Ohio, who on that date issued a warrant for the search of petitioners' business premises and seizure of the property described in the warrant. The warrant was executed on March 29, 1989, by Ramsak and eleven other F.B.I. agents, ten

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[4] Arcade Sound is not a corporation and therefore has no parent or subsidiary. Rule 29.1, Supreme Court Rules.

of whom, in addition to Ramsak, are respondents in this case.

In their complaint filed in the district court on February 16, 1993, and thereafter amended, petitioners alleged claims at Counts V and VI arising out of the individual respondents' negligent, careless and malicious investigation, execution of the warrant, search of petitioners' premises, and in their loss of some and damage to much of petitioners' seized property, a portion of which property was returned in even more damaged condition, resulting in injury to petitioners, in violation of their rights under the Fourth and Fifth Amendments.

Petitioners' amended complaint and an affidavit of petitioner Andrew Kurinsky affirmed those allegations, attested to other acts of the individual respondents, described the manner in which all of petitioners' business inventory, which was in various stages of manufacture or repair, or which had been recently received at the search premises and was unopened, or which had been boxed, packaged and sealed for shipment and whose contents were not readily discernable, were seized, together with their business records and computer equipment, and recounted the reckless manner in which the inventory was seized and thrown into boxes by the individual respondents without any regard whatever to the damage then being done by them to the equipment.

In addition to their claims for damage to their property, petitioners asserted claims for injury to their persons by reason of emotional distress alleged to have been suffered as the direct and proximate result of the respondents' conduct described in the amended complaint.

The District Court found, as noted in the Statement of the Case, upon the authority of *Friedman v. Estate of Presser*, 929 F.2d 1151 (6th Cir. 1991), that Ohio's two-year statute of limitations contained in Ohio Rev. Code § 2305.10, which is one of Ohio's several personal injury statutes of limitations, barred the *Bivens* claims, and, therefore, dismissed these claims. Memorandum, A-29. The Court of Appeals affirmed upon the same authority.

REASONS FOR GRANTING THE WRIT

In *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), this Court first recognized the right of an individual to recover damages directly from a federal agent who while acting under color of federal authority violated rights of the individual guaranteed under the Fourth Amendment. In *Davis v. Passman*, 442 U.S. 228 (1979), the right of action was extended to embrace an action for damages resulting from a denial of due process guaranteed under the Fifth Amendment. Although the Court created what has come to be referred to as a *Bivens*-

type, or *Bivens* action, the Court did not then, and has not since, addressed the issue of what statute of limitations is applicable to such actions.

In *McSurely v. Hutchison*, 823 F.2d 1002, 1005 (6th Cir. 1987), *cert. denied*, 108 S. Ct. 1107 (1988), the Sixth Circuit determined that the rule of *Wilson v. Garcia*, 471 U.S. 261 (1985), directing federal courts to determine a statute of limitations for a 42 U.S.C. § 1983 cause of action (which statute contained no statute of limitations) by borrowing the most appropriate state personal injury statute of limitations, would be applied to a *Bivens* action that had been transferred to the United States District Court for the Western District of Kentucky. In *Friedman v. Estate of Presser*, 929 F.2d 1151, 1158-59 (6th Cir. 1991), the Sixth Circuit, with no discussion of which Ohio personal injury statute of limitation should be applied, extended its reliance on borrowing the state's statute of limitations to a *Bivens* action filed in Ohio, by holding that the two-year limitation in Ohio Rev. Code § 2305.10 applied.

In reaching its decision in *Friedman v. Presser*, the Court of Appeals did not pause to consider (a) whether Ohio Rev. Code § 2305.10 was indeed the applicable Ohio statute to be applied under *Owens v. Okure*, 488 U.S. 235 (1989), or (b) whether in view of the enactment of 28 U.S.C. § 1658, which establishes a four-year statute of limitations for civil actions created by acts of Congress but for which no statute of limitations is

provided, it was any longer necessary to borrow an appropriate state statute.

This case squarely presents the Court with the opportunity to consider whether it is appropriate for a federal court to borrow a state statute of limitations for a *Bivens* action. If the Court were to conclude that such borrowing is not appropriate, the Court would be unconstrained from establishing a uniform, federal common-law rule of limitation for a *Bivens* action.

If the Court, however, were to conclude that the rule of *Wilson v. Garcia* is applicable to a *Bivens* action, then petitioners entreat the Court to review the decision of the court below, and those other decisions of the Sixth Circuit upon which it relies, to determine whether the Ohio statute of limitations borrowed by the Sixth Circuit is the statute mandated by *Owens v. Okure* to be applied to § 1983 and *Bivens* actions brought in federal district courts in Ohio.

The latter issue is particularly acute in view of the fact that at least three intermediate Ohio appellate courts that have considered the issue, as well as an esteemed commentator who has examined the issue in depth, have concluded that a § 1983 action brought in Ohio is subject to the four-year general statute of limitations contained in Ohio Rev. Code § 2305.09(D), rather than the two-year statute, Ohio Rev. Code § 2305.10 selected by the Sixth Circuit in *Browning v. Pendleton*, 869 F.2d 989 (6th Cir. 1989). If the Court

were to agree, then petitioners' *Bivens* action would, under the rule of *McSurely v. Hutchison*, be found to have been timely filed.

I. THE COURT SHOULD FASHION A FOUR YEAR FEDERAL COMMON-LAW RULE OF LIMITATION FOR A *BIVENS*-TYPE ACTION.

The practice of borrowing the most analogous or most appropriate state statute of limitations to be applied to an action created by Congress and for which action no statute of limitations was provided is well established. This procedural practice is particularly well-rooted with regard to civil rights actions brought under 42 U.S.C. § 1983. Here the impetus for borrowing the most analogous state statute arises from Congress' express directive in 42 U.S.C. § 1988 that where federal law is found to be deficient in providing the suitable remedy for a congressionally recognized civil rights action, the district courts shall apply:

> ... the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil ... cause is held, *so far as the same is not inconsistent with the Constitution and laws of the United States....*

Id., 42 U.S.C. § 1988(a) (emphasis added). Thus, the inquiry in § 1983 actions has always been not whether to borrow, but rather *what* statute or statutes should be borrowed, which question spawned endless debate until seemingly put to rest by *Wilson v. Garcia*, 471 U.S. 261 (1985), only to be reexamined and finally resolved by *Owens v. Okure*, 488 U.S. 235 (1989).

A *Bivens*-type action, however, having been created by this Court rather than Congress, is not controlled by the directive contained in § 1988. And although there may at one time have been good cause to follow the procedure dictated by § 1988 with regard to a § 1983 action in the determination of the statute of limitations for a *Bivens* action, upon the enactment of 28 U.S.C. § 1658 as part of the Judicial Improvement Act of 1990 (Pub. L. No. 101-650), the foundation for adherence to the rule of *Wilson* and *Owens* evaporated. For where there previously had been no statement of a national policy on which statute of limitations should be applied to a congressionally created civil cause of action for which no correlative statute of limitations was provided, § 1658, in providing for a four-year statute of limitations for such actions, filled the void. Henceforth, Congress declared in its enactment of § 1658, a plaintiff shall be afforded four years within which to bring suit on his federally-created action.

It is beyond dispute that adherence to a rule which subjects *Bivens* plaintiffs to a wide range of state

statutes of limitations results in disparate treatment of the same federal cause of action. Even the District Court in this case was constrained to comment that "reliance on a state's statute of limitations for *Bivens* claims results in inconsistent, and often discriminatory, treatment of plaintiffs in different states." App. at A-31.

In the borrowing of an analogous state statute, even in the context of a borrowing for a § 1983 action, the admonition of Justice Marshall in *Owens v. Okure* that such borrowed statute be "consistent with federal law and policy[ ] *Occidental Life Ins. Co. of California v. EEOC*, 432 U.S. 355, 367 (1977); *Johnson* [*v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975)] at 465," *Owens*, 488 U.S. at 239, should not be disregarded. This case is an example of just such an inconsistency and serves to prove the rule advocated by petitioners. Here, the Court of Appeals has applied a two-year statute of limitations to a *Bivens* action brought in a federal court in Ohio. Unless the Court of Appeals' decision is held to be in error for misapplication of the mandate of *Owens v. Okure*, as argued below by petitioners, we are confronted with the anomalous situation of applying a two-year statute of limitations to a federal cause of action which has no correlative statute of limitations, in defiance of a Congress' pronouncement that such actions, admittedly those

congressionally created, be subjected to a four year statute of limitations.

In approaching the question of whether it should recognize a federal common law rule, the Court in the past has focused on whether "there is a federal statute dealing with the general subject," *Wallis v. Pan American Petroleum Corporation*, 384 U.S. 63, 69 (1966), and whether there exists "a significant conflict between some federal policy or interest and the use of state law." *Id.* at 68.

That a national policy exists on the issue of the appropriate statute of limitations on a federal cause of action for which no specific statute of limitation has been provided cannot be denied. That a "significant conflict" exists between the Ohio statute and the federal policy as expressed in § 1658 likewise cannot be denied. The state statute should be avoided.

There simply is no need for resort to state statutes of limitations where a federal statute already exists. This is especially so, where resort to the state statute yields an inconsistency not tolerable under § 1988. As Justice Blackmun observed in his dissent in *Robertson v. Wegmann*, 436 U.S. 548, 596 (1978), from the Court's readiness to borrow Louisiana's statute on survival of actions to determine whether the prosecution of a § 1983 action commenced by plaintiff's decedent should be abated, rather than adopt a federal common-law rule on the issue:

> The federal law and the underlying federal policy stand bright and clear. And in light of that brightness and of that clarity, I see no need to resort to the myriad to state rules governing the survival of state actions.

Thus, in *Carlson v. Green,* 446 U.S. 14 (1980), the issue related to which law governed the determination of the survival of the action: the state law, which would have abated decedent's administratrix's *Bivens* action arising out of defendants' conduct which allegedly caused decedent's death, or the federal common law, which presumably would have permitted the action to survive. The Court held that despite the fact that there was no federal statutory right recognizing the survival of the action, the Court would fashion a common-law rule of survival of the action so that the *Bivens* right of action, and all that is inherent in that right of action, would be vindicated. In so holding, Justice Brennan distinguished a *Bivens* action from an action brought under the Federal Tort Claims Act, which is dependent on the existence of a state right of action, and stated that the need for uniform rules to redress constitutional violations was obvious:

> [I]t is obvious that the liability of federal officials for violations of citizens' constitutional rights should be governed by uniform rules. . . . The question of whether respondent's action for violations by federal officials of federal consti-

> tutional rights should be left to the vagaries of the laws of the several States admits of only a negative answer in the absence of a contrary congressional resolution.

Id., 446 U.S. at 23. Justice Brennan distinguished *Carlson* from *Robertson* by noting, *inter alia,* that whereas § 1988 operated as a compulsion to the Court's decision in *Robertson*, which was a § 1983 action, § 1988 did not by its "terms apply to *Bivens* actions", and that there were "no cogent reasons to apply it to such actions even by analogy." *Carlson,* 446 U.S. at 24, f. 11. Nor did the Rules of Decision Act, 28 U.S.C. § 1652, as contended by now Chief Justice Renquist in dissent, *Id.*, 466 U.S. at 43, bar the Court's formulation of the federal common-law rule.

The case at bar presents as compelling a basis for the fashioning of a federal common law rule of limitation. In *Carlson,* the Court acted to formulate a federal common law rule to preserve the efficacy of the *Bivens* action which filled the interstices of the gap between it and the companionate FTCA action. Petitioners here seek a rule which will also protect the efficacy of their *Bivens* action, and which will do so in a manner wholly consistent with declared congressional policy on the issue.

In this case, there is "no need" to resort to state statutes. The Court, in considering the applicable

statute of limitations for a *Bivens* action, is not as Justice Brennan noted, subject to the borrowing directive of § 1988. It is, however, to be guided by Congress' declaration of a national policy, through Congress' enactment of § 1658, relating to the length of time that must be afforded a plaintiff to commence a federal action for which a limitation that would bar it is not otherwise provided. The federal common-law rule espoused will be employed in aid of an action brought to redress a federal constitutional deprivation, not a mere tort founded on state law.

The fashioning of a federal common-law rule of limitation for *Bivens*-type actions is a salutary step that this Court should take. The current disparity of treatment of *Bivens* plaintiffs, and defendants as well, should be ended.

II. THE MANDATED STATUTE OF LIMITATIONS APPLICABLE TO A *BIVENS*-TYPE ACTION IN A FEDERAL DISTRICT COURT IN OHIO IS FOUR YEARS AS PROVIDED BY OHIO REVISED CODE § 2305.09(D).

The question of the appropriate statute of limitations in a *Bivens*-type case was presented to the Sixth Circuit for the first time in *McSurely v. Hutchison*, 823 F.2d 1002 (6th Cir. 1987), *cert. denied*, 485 U.S. 934 (1988). The Court of Appeals had little difficulty in

concluding that because a *Bivens* action was analogous to a § 1983 action, the rule of *Wilson v. Garcia* should be applied, and that Kentucky's one-year statute of limitations for "injury to the person of the plaintiff," rather than the state's five year statute for "an action for an injury to the rights of plaintiff...not otherwise enumerated," was the most appropriate statute to be applied to the *Bivens* action. *Id.* 823 F.2d at 1005. The court rejected as unpersuasive the plaintiff's contention that a *Bivens* action was not a congressional enactment as was the § 1983 action in *Wilson*, and held that the similarities between the two actions warranted following *Wilson* in determining the applicable statute of limitations.

Thereafter, when the Sixth Circuit was presented with an Ohio *Bivens* action, as it was seven years later in *Friedman v. Estate of Presser*, *supra*, the court, without discussion and without considering that Congress had enacted 28 U.S.C. § 1658 subsequent to *McSurely*, summarily declared that the statute of limitations in a *Bivens* action brought in a federal court sitting in Ohio was two years on application of the court's decision in *Browning v. Pendleton*, 869 F.2d 989 (6th Cir. 1989). In so holding, the court compounded its misreading of *Owens v. Okure*, and this Court's clear directive given in that case for determining which Ohio statute of limitations should be borrowed in a § 1983 action.

In *Owens v. Okure*, the Court held that where a state had multiple statutes of limitations for personal injury actions, a court considering which statute was applicable to a § 1983 action should "*borrow the general or residual statute for personal injury actions.*" *Id.* at 250. (Emphasis supplied). Justice Marshall, speaking for a unanimous Court in *Owens*, included important explanatory footnotes in his opinion that apply to the selection of the correct Ohio statute in a § 1983 action. In footnotes 9 and 10, Justice Marshall gave examples of what he referred to as a state's "general" provision for personal injury actions, and a state's "residual" provision for personal injury actions. He cites as representative of "general" personal injury provisions Alabama Code § 6-2-38(1) (Supp. 1988), pertaining to "[A]ny injury to the person or rights of another not arising from contract and not specifically enumerated," and North Carolina Gen. Stat. § 1-52(5) (1988), "[A]ny other injury to the person or rights of another, not arising on contract and not hereafter enumerated." *Id.* at 580, fn. 9. At footnote 10, District of Columbia Code § 12-301(8) (1981), and Colorado Rev. Stat. § 13-80-102(i) (1987), are cited as representative of a state's "residual" provision, which applies "to all actions not specifically provided for, including personal injury actions." *Id.* at 580.

Justice Marshall further explained:

> Our decision today is fully consistent with *Wilson's* rejection of a state residual, or "catch-all," limitations provision as the appropriate one for Section 1983 actions. 471 U.S. at 278, 105 S.Ct. at 1948. In *Wilson*, we rejected recourse to such provisions in the first instance, a position we continue to embrace. *Courts should resort to residual statutes of limitations only where state law provides multiple statutes of limitations for personal injury actions and the residual one embraces, either explicitly or by judicial construction, unspecified personal injury actions.* See, e.g., *Small v. Inhabitants of City of Belfast*, 796 F.2d 544(CA 1 1986) (construing Maine's catch-all statute as the general personal injury provision); *Alley v. Dodge Hotel*, 163 U.S. App. D.C. 320, 501 F.2d 880 (1974) (*per curiam*) (construing District of Columbia's catch-all statute as the general personal injury provision).

Id. at 251, fn. 12 (emphasis supplied).

Petitioners contend that under the Ohio statutory scheme, the general statute of limitations for unenumerated personal injury actions, and that statute which under *Owens* should be applied to § 1983 and *Bivens* claims, is Ohio Revised Code § 2305.09(D), which provides, in pertinent part:

> An action for any of the following causes shall be brought within four years after the cause thereof accrued:
>
> * * * *
>
> (D) For an *injury to the rights of the plaintiff not arising on contract nor enumerated in §§ 2305.10 to 2305.12*, inclusive, and 1304.29 of the Revised Code.

(Emphasis supplied). Ohio Revised Code § 2305.10, the statute selected by the Sixth Circuit in *Browning v. Pendleton*, provides, in pertinent part:

> An action for bodily injury or injuring personal property shall be brought within two years after the cause thereof arose.

Examples of the selection of general or residual state personal injury statutes of limitations wholly consistent with the doctrine of *Owens v. Okure* are found in *Gray v. Lacke*, 885 F.2d 399, 407-08 (7th Cir. 1989), *cert. denied*, 494 U.S. 1029 (1990), (Wisconsin's six year catch-all statute of limitations, covering all actions for damages "for injury to character or rights of another, not arising under contract ... except where a different period is expressly prescribed," held applicable under *Wilson*, rather than Wisconsin's three year statute covering claims "for injuries to the person"), and

Van Strum v. Lawn, 940 F.2d 406, 407-09, fn.1 (9th Cir. 1991) (clarifying that the Washington catch-all statute it had selected as the applicable statute, Wash. Rev. Code § 4.16.080(2), which covered "any other injury to the person or rights of another not herein enumerated", was really Washington's general personal injury statute).

This issue was most recently considered by the Second Circuit Court of Appeals in *Lounsbury v. Jeffries*, 25 F.3d 131 (2d Cir. 1994), in which the court, in determining which of Connecticut's multiple personal injury statutes of limitations applied to a § 1983 action, distilled the issue by stating that the "pivotal question" under *Owens* is:

> ... what state statute of limitations applied to unenumerated personal injury claims.

Id., at 134, and upon application of that test reversed the district court's selection of Connecticut's two-year statute for personal injury actions arising upon negligence or from reckless or wanton misconduct, in favor of a three-year statute for actions founded upon tort, which the court concluded must be recognized under *Owens* as Connecticut's general tort statute of limitations.

In view of the foregoing considerations, it is difficult to understand how or why the Sixth Circuit concluded as it did in *Browning v. Pendleton* that Ohio's two-year

statute of limitations applied to a § 1983 action filed in a federal court in Ohio. Ohio has at least six statutes of limitation relating to personal injury actions.[5] Petitioners speculate that the answer lies in the fact that in *Browning* the court never considered § 2305.09(D).[6] Inasmuch as *Browning* was decided by a unanimous *en banc* court, plaintiffs such as petitioners have met with no success in their attempts to reconvene the court to reconsider or to consider anew its *Browning* decision.

At least three Ohio appellate courts, however, have construed *Owens* to mandate the application of Ohio Revised Code § 2305.09(D) to § 1983 actions brought in Ohio courts on causes of action that accrued in Ohio. *Bojac Corp. v. Kutevac*, 64 Ohio App. 3d 368, 581 N.E.2d 1119 (Trumbull 1990), *Weethee v. Boso*, 64 Ohio App. 3d 532, 582 N.E.2d 19 (Franklin 1989), m.c.o. 48 Ohio St. 3d 709, 550 N.E.2d 482 (1990) and *Martin v. Adult Parole Authority*, 1994 WL 66662, No. 9-93-45 (Ohio App. 3d Dist., March 4, 1994), m.c.o. 69 Ohio St.

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[5] See Ohio Revised Code §§ 2305.09, 2305.10, 2305.11, 2305.111, 2305.112 and 2305.131.

[6] See Judge Milburn's statement in *Browning*: "The question before us is whether the appropriate statute of limitations for § 1983 actions arising in Ohio is contained in Ohio Rev. Code Ann. § 2305.11...or Ohio Rev. Code Ann. Section 2305.10." *Id.*, 869 F.2d at 990.

3d 1489, 635 N.E.2d 43 (1994). In *Bojac*, the court concluded:

> It is clear that appellant's claim under Section 1983 does not fit into any of the categories of R.C. 2305.10 through 2305.12. It must, therefore, fall within the general or residual statute for personal injury actions, which is R.C. 2305.09(D). *This is the most logical and appropriate result based on the United States Supreme Court holding in Owens v Okure, supra.*

64 Ohio App. 3d at 370 (emphasis added). Although these decisions had no compelling precedential effect on the court below, the views of these Ohio appellate courts construing Ohio statutes and which recognize § 2305.09(D) as the applicable statute of limitations were deserving of some consideration, but by reason of the necessity for *en banc* review, the request for which was denied petitioners, the import of these Ohio cases was not addressed below.

The disharmony between Ohio courts, which have concurrent jurisdiction,[7] and federal district courts in Ohio in adjudicating § 1983 actions that accrue in Ohio,

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[7] The Supreme Court of Ohio has established that an Ohio common pleas court has jurisdiction to hear a § 1983 damage action. *Cooperman v. University Surgical Assocs.*, 32 Ohio St. 3d 191, 198, 513 N.E.2d 288, 296 (1987).

on the applicable Ohio statute of limitations is troublesome, for it appears that an Ohio plaintiff possessing a federally conferred § 1983 right of action may be obliged to bring his action in a state court because the federal court applies a more restrictive statute of limitations on the same cause of action. Such an anomalous circumstance should not be permitted to deny a plaintiff his federal forum.

The Ohio Supreme Count, in considering the applicable statute of limitations for an action for abuse of process, recently reaffirmed that § 2305.09(D) constitutes the state's general statute of limitations for personal injury actions. *Yaklevich v. Kemp, Schaeffer & Rowe Co.*, 68 Ohio St. 3d 294, 300, 626 N.E.2d 115, 119-20 (1994). In yet another case, the Cuyahoga County Court of Appeals has recognized that § 2305.09(D) is Ohio's "general or residual statute for personal injury actions." *Painter v. Graley*, 84 Ohio App. 3d 65, 73, 616 N.E.2d 285, 291 (Cuy. 1992), *aff'd on other grounds*, 70 Ohio St. 3d 377, 639 N.E.2d 51 (1994).

Finally, petitioners' position on this issue is supported by Professor Steven H. Steinglass in his recently published comprehensive article entitled *Section 1983 Litigation in the Ohio Courts: An Introduction for Ohio Lawyers and Judges*, 41 CLEVE. ST. L. REV. 407, 492 (1993). Prof. Steinglass' exegesis of the Sixth Circuit's selection of the two-year Ohio statute of

limitations contained in § 2305.10 closely parallels that made by petitioners in this petition. He would have had the Sixth Circuit select § 2305.09(D) as the appropriate statute and, while conceding that the Sixth Circuit did not consider this statute in *Browning v. Pendleton*, he concludes that that court's recognition of § 2305.10 as the appropriate statute is "simply wrong." Professor Steinglass states:

> [A] strong case can be made that the Sixth Circuit's adoption of the two-year limitations period for claims involving bodily injury is simply wrong. The Supreme Court in *Owens* had required the use of the residual personal injury limitations period when there are multiple personal injury limitations periods, and the Court identified Ohio as an example of a state in which multiple limitations periods for intentional torts, including the two-year limitations for bodily injury, made necessary the use of the *general or residual personal injury* limitations period. Thus, it is difficult to reconcile the Sixth Circuit's adoption of the two-year limitations period for claims involving bodily injury with the Supreme Court's decision in *Owens*.

41 CLEVE. ST. L. REV. at 492 (footnotes omitted).

So strong is the case here made for reversal of the judgment of the Court of Appeals "for failure to follow the mandate of this Court" in *Owens* (See S. Ct. Rule

10.1(c)) that certiorari should be granted and summary reversal should be entered--that is, if the Court declines to grant certiorari on petitioners' first question presented for review, concerning petitioners' proposed federal common-law rule of limitation for a *Bivens* action.

CONCLUSION

For all the foregoing reasons, petitioners respectfully request that a writ of certiorari be granted to the Court of Appeals for this Court's review of the important questions here presented.

Respectfully submitted,

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January 1995

APPENDIX

No. 93-3886

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUITT

ANDREW C. KURINSKY, JR.; DONNA A. KURINSKY; and KATHERINE A. KURINSKY, a Minor, by and through her parent, natural guardian and next friend, Andrew C. sky, Jr., *Plaintiffs-Appellants*	:	(Decided and Filed August 26, 1994)
v.	:	
UNITED STATES OF AMERICA, and the named persons each individually and as a Special Agent of the Federal Bureau of Investigation; JOSEPH L. RAMSAK, WILLIAM D. HANN; BARRY GUMMOS; BION ST. BERNARD; KEVIN D. BURNETT; DAN ELVEN ESTREM; GARY L. HALL; ALBERT L. McGINTY, JR.; JAMES M. OWENS; LANCE R. SAKURADA and JAMES J. WHITE, *Defendants-Appellants*	:	

Before: GUY and BOGGS, Circuit Judges; and CONTIE, Senior Circuit Judge.

RALPH B. GUY, JR., Circuit Judge. In this Federal Tort Claims Act ("FTCA" or "ACT") case, Andrew C. Kurinsky, Jr.; his wife, Donna A. Kurinsky; and Katherine A. Kurinsky, a minor, appeal the dismissal of their action against the United States and eleven special agents of the Federal Bureau of Investigation.[1] The district court's dismissal was grounded in the exception found in 18 U.S.C. § 2680(c) for claims based on the detention of goods and merchandise by law enforcement officers. The Kurinskys also appeal the dismissal of their *Bivens* claims against the individual agents, which the court found were time-barred. For the reasons that follow, we find the district court's reading of § 2680(c) to be in error. Therefore, we reverse in part and affirm in part.

I.

We summarize only those facts believed necessary to an understanding of the issues raised on appeal.

The Kurinskys own and operate a business known as Arcade Sound, which manufactures, recycles, repairs, and distributes cable television equipment and related

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[1] The district court, in its opinion, listed twelve agents as defendants. The "extra" agent, Linda T. Berry, was not named in the Kurinskys' amended complaint, so we have not identified her as one of the defendants on appeal.

electronic equipment. Prior to March 1989, the FBI suspected that Andrew Kurinsky was violating 47 U.S.C. § 553(a)(2), which prohibits the unauthorized reception of cable services, and was committing wire fraud, in violation of 18 U.S.C. § 1343. As a result, the FBI placed Kurinsky under surveillance. On March 27, 1989, based on information supplied by the FBI, a magistrate judge issued a search warrant for the Arcade Sound premises. On March 29, the FBI agents executed the search warrant and seized cable signal descramblers, cable television converters, assorted hardware, personal computers, numerous documents, and two handguns. According to the Kurinsky, no inventory of the seized goods was made while the property was removed; the property was mishandled and damaged; and common electronic components, which are not unique to the cable television industry, were taken. The Kurinskys also allege that, in the course of the agents' execution of the warrant, they were subjected to great emotional distress, embarrassment, and humiliation. The United States claims that the property was returned to the Kurinskys between April 7, 1989, and October 4, 1990. The Kurinsky claim that not all of the property was returned.

On October 29, 1992, the Kurinskys filed a six-count action against the United States and the FBI Agents, alleging damages stemming from the execution of the search warrant. Counts I, II, and II are brought

pursuant to the FTCA. Count IV alleges a violation of the due process clause of the Fifth Amendment, and counts V and VI are *Bivens* claims against the FBI agents under the Fourth and Fifth Amendments.

On separate motions brought by the United States pursuant to Fed. R. Civ. P. 12(b)(1), and by the FBI agents as a group pursuant to Fed. R. Civ. P. 12(b)(1) and (6) or, in the alternative, for summary judgment under Fed. R. Civ. P. 56(b), the district court found that the FTCA claims were barred by the exception to the Act's waiver of sovereign immunity contained in § 2680(c). The court also found that sovereign immunity barred the Fifth Amendment due process claim for the taking of the Kurinskys' property. Finally, the court dismissed the *Bivens* claims upon a finding that they were not brought within the two-year limitations period for the bringing of such actions.

II.

The FTCA provides generally that the United States shall be liable, to the same extent as a private party, "for injury or loss of property ... caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." 28 U.S.C. § 1346(b). The Act's broad waiver of immunity, however, is subject to enumerated exceptions. 28 U.S.C. § 2680(a)-(n). One of those exceptions, § 2680(c), provides that § 1346 shall not apply to

> [a]ny claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

The Kurinskys insist that § 2680(c) applies only to property losses involving customs or tax agents, or other law officers acting in the aid of the enforcement of customs or tax laws. *See Formula One Motors, Ltd. v. United States*, 777 F.2d 822, 825 (2d Cir. 1985) (Oakes, J., concurring); *A-Mark, Inc. v. United States Secret Service*, 593 F.2d 849, 851 (9th Cir. 1978) (Tang, J., concurring). Because the FBI's search and seizure was unrelated to customs or tax laws, the Kurinskys maintain the exception does not apply here.

In the government's view, and as the district court found, § 2680(c) applies to exclude a claim for the damage here because it was incurred in the course of a search and seizure undertaken by a "federal law-enforcement officer." According to the government, since FBI agents are "law enforcement officers" and this suit arose out of "the detention of [the Kurinskys'] goods or merchandise," the district court's order of dismissal was not in error.

While this court has applied § 2680(c) to IRS agents, we have yet to address its application to other law enforcement officers. Similarly, the Supreme Court has refused to determine whether § 2680(c) applies

where the officers who detained the property were not customs or tax officials and were not acting in a customs or tax capacity. *See Kosak v. United States*, 465 U.S. 848, 852 n.6, 104 S. Ct. 1519, 1522 n6, 79 L.Ed.2d 860 (1984). therefore, we begin our inquiry into the scope of § 2680(c) on a clean slate.

It is well settled that the first step in determining the meaning of a statute is to review the language of the statute itself. *United States v. Johnson*, 855 F.2d 299 (6th Cir. 1988). "'[O]nly the most extraordinary showing of contrary intention from [the legislative history] would justify a limitation on the 'plain meaning' of the statutory language.'" *Id.* at 305 (quoting *Garcia v. United States*, 469 U.S. 70, 75 (1984).

According to the government, the term "any other law-enforcement officer" was included in § 2680(c) as a sort of catch-all provision. The principle of *ejusdem generis*,[2] however, suggests that such a general term

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[2] This term is defined in BLACK'S LAW DICTIONARY 464 (5th ed. 1979) as follows:

> Of the same kind, class, or nature. In the construction of laws, wills, and other instruments, the "ejusdem generis rule" is, that where general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things

should be understood in light of the specific terms that surround its. *Hughey v. United States*, 495 U.S. 411, 419 (1990). Similarly, under the principle of statutory construction known as *noscitur a sociis*,[3] a general term in interpreted within the context of the accompanying words "to avoid the giving of unintended breadth to the Acts of Congress." *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961). Here, the specific terms "tax" and "customs duty" indicate that Congress was concerned with those detentions, however they might arise,

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> of the same general kind or class as those specifically mentioned. The rule, however, does not necessarily require that the general provision be limited in its scope to the identical things specifically named. Nor does it apply when the context manifests a contrary intention.

(Citations omitted).

[3] BLACK'S LAW DICTIONARY, *supra* note 2, at 956, defines this term as follows:

> It is known from its associates. The meaning of a word is or may be known from the accompanying words. Under the doctrine of "noscitur a sociis," the meaning of questionable words or phrases in a statute may be ascertained by reference to the meaning of words or phrases associated with it.

occurring within the context of tax and customs activities. As Judge Tang observed:

> The governmental function of assessing and collecting customs duties necessarily requires some period of detention when the imported item is inspected for purposes of evaluation. A similar situation often arises when property must be levied against for tax purposes. It follows that where the ultimate act of assessing the tax or duty is rendered exempt, the incidental activity of detention must also be protected. § 2680(c) contains parallel clauses which cover "the assessment or collection of *any tax or customs duty*, or the detention of any goods or merchandise by *any officer of customs or excise* or any other law-enforcement officer." The clauses both dwell exclusively on customs and taxes, except for the final reference to other law-enforcement officers. The "any other law-enforcement officer" phrase should be viewed as Congress' recognition of the fact that federal officers, sometimes become involved in the activity of detaining goods for tax or customs purposes.

A-Mark, 593 F.2d at 850-51 (Tang, J., concurring) (emphasis in original).

In order to interpret § 2680(c) as the government urges, we would have to focus selectively on specific provisions of that section without reading it in its entirety. The Supreme Court has observed, however, that "[w]e do not ... construe statutory phrases in

isolation; we read statutes as a whole." United States v. Morton, 467 U.S. 822. 828 (1984). Moreover, even if § 2680(c) were read piecemeal, it would not convey the meaning suggested by the government. Significantly, Congress chose to use the word "detention" instead of the word "seizure." A detention is generally associated with a period of temporary custody or delay. It carries not connotation of permanent custody, nor does it necessarily suggest an adversarial interest insofar as ownership is concerned. It is a term often associated with an ongoing investigation. A seizure, on the other hand, must be viewed as a term of art in this context. Black's Law Dictionary 1219 (5th ed. 1979) defines seizure as "[t]he act of taking possession of property, *e.g.*, for a violation of law or by virtue of an execution." In common with a "detention," a "seizure" may be temporary and involve the goods of another; however, a seizure has an "after-the-fact" quality not associated with a detention. When goods are seized pursuant to a lawful search, their relevance to a legal proceeding already has been predetermined. Similarly, if goods are seized pursuant to an execution or forfeiture, there is no intention to return. The seizure is adversarial to the ownership interest of the person from whom the property is seized. Had Congress intended to except from the reach of the FTCA damages arising out of seizures, we believe it would have said so. Instead, Congress elected to use the word detention, and to be

consistent with this language, § 2680(c) must be read as only applying to law enforcement officers engaged in activities with a nexus to the collection of taxes or customs duties.

This reading is supported by what little legislative history there is on § 2680(c). The Senate Report to the Legislative Reorganization Act of 1946 had the following to say about the tort claim exceptions:

> This section specifies types of claim[s] which would not be covered by the title. They include ... claims which relate to certain governmental activities which should be free from the threat of damage suit, or from which adequate remedies are already available. These exemptions cover claims arising out of the loss or miscarriage of postal matter; the assessment or collection of taxes or assessments; the detention of goods by customs officers....

A-Mark, 593 F.2d at 851 (Tang, J., concurring)(quoting S.Rep. No. 1400, 79th Cong., 2d Sess. 33 (1946)). The report makes no mention whatsoever of an exemption for any and all seizures by law-enforcement officers. When Alexander Holtzoff, then Special Assistant to the Attorney General, appeared before the Senate Subcommittee weighing passage of the FTCA in 1940, he explained:

> The ... exception relates to claims arising in respect of the assessment or collection of any

> tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law enforcement officer. There are various tax laws providing the machinery for recovering back any tax that has been paid but was not properly owing. There was no purpose in interfering with that machinery.

Formula One, 777 F.2d at 825 (Oakes, J., concurring)(quoting Tort Claims Against the United States: Hearings on S. 2690 Before a Subcomm. of the Senate Comm. on the Judiciary, 76th Cong., 3d Sess. 38 (1940)). Simply put, the legislative history of the Act is consistent with our reading of § 2680(c) and there is no basis for departing from the "plain meaning" of the statute.

We recognize that our holding creates a split among the circuits. The other appellate courts that have addressed this issue have found that the phrase "other law-enforcement officer" includes all types of officers, whatever their duties. However, those cases have not articulated a clear reason for this holding, and have often stated their conclusions with little or no analysis. *See, e.g., Halverson v. United States*, 972 F.2d 654 (5th Cir. 1992), *cert. denied,* ___ U.S. ___, 113 S.Ct. 1297 (1993); *Cheney v. United States*, 972 F.2d 247 (8th Cir. 1992); *Schlaebitz v. United States Dep't of Justice*, 924 F.2d 193 (11th Cir. 1991); *Ysasi v. Rivkind*, 856 F.2d 1520 (Fed.Cir.1988); *United States v. 2,116 Boxes of*

Boned Beef, 726 F.2d 1481 (10th Cir.), *cert. denied*, 469 U.S. 825 (1984); *United States v. Lockheed L-188 Aircraft*, 656 F.2d 390 (9th Cir. 1979). One of the cases most frequently cited by the other circuits is *Formula One*. In *Formula One*, the court began its analysis by noting that while "several circuits have ruled ... that [§] 2680(c) applies to detentions beyond the context of customs duties and taxes," this has been done "with scant discussion." 777 F.2d at 823. The court went on to hold that the actions in question fell within the scope of § 2680(c), but stated that it was reaching this holding "without determining whether the exemption would apply to searches by law enforcement officers with no relationship to the customs or excise functions." *Id.* at 823-24. The conduct in *Formula One* was "sufficiently akin to the functions carried out by Customs officials to place the [DEA] agents' conduct within the scope of [§] 2680(c)." *Id.* at 824. Therefore, contrary to the proposition for which it is often cited, *Formula One* does not hold that § 2680(c) should apply to the activities of all law enforcement officers regardless of whether there is a nexus between tax and customs activities. Given the lack of analysis by the other circuits, and what in our opinion is a misreading of *Formula One*, we do not feel obligated to join them in their interpretation of § 2680(c). Accordingly, we hold that § 2680(c) is limited to the detention of goods by law enforcement officers acting in a tax or customs capacity, and thus the

district court erred in dismissing the FTCA claims brought by the Kurinskys.

III

The Kurinskys next argue that they should be able to seek damages directly against the United States, without regard to the limitations of the FTCA, for asserted Fifth Amendment due process violations. The federal government, however, is amenable to suit only insofar as it has consented to be sued. *See United States v. Mitchell*, 463 U.S. 206, 212 (1983); *United States v. Testan*, 424 U.S. 392, 399, 96 S.Ct. 949, 953-54, 47 L.Ed.2d 114 (1976). Since the United States has not waived its sovereign immunity with respect to alleged violations of the Fifth Amendment, except as provided under the Tucker Act, 28 U.S.C. § 1346, the district court did not err in dismissing this claim. *See Nuclear Transp. & Storage, Inc. v. United States*, 890 F.2d 1348, 1351-53 (6th Cir. 1989), *cert. denied*, 494 U.S. 1079 (1990).

Finally, the Kurinskys contend that the district court erred in applying a two-year statute of limitations to their *Bivens*[4] claims. In *McSurely v. Hutchinson*, 823 F.2d 1002 (6th Cir. 1987), *cert. denied*, 485 U.S. 934 (1988), this court held that *Bivens* actions should be governed by the same statute of limitations as § 1983

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[4] *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

actions. Later, in a unanimous *en banc* decision, this court held that the two-year period in Ohio Revised Code § 2305.10 governs actions under 42 U.S.C. § 1983. *Browning v. Pendleton*, 869 F.2d 989, 990 (6th Cir. 1989). Thus it follows, as this court recently observed in *Friedman v. Estate of Presser*, 929 F.2d 1151, 1158 (6th Cir. 1991), the relevant Ohio statute of limitations for *Bivens* actions is two years.

The Kurinskys maintain that the four-year statute of limitations found in Ohio Revised Code § 2305.09[5] is more appropriate, and thus counts V and VI are saved. They argue that, since this court's decision in *Browning*, there have been at least two Ohio appellate court decisions that indicate a four-year period should be applied to § 1983 actions.[6] The Kurinskys concede that

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[5] Section 2305.09 provides, in relevant part:

> An action for any of the following causes shall be brought within four years after the cause thereof accrued:
> ....
>
> (D) For an injury to the rights of the plaintiff not arising on contract nor enumerated in sections 2305.10 to 2305.12, inclusive, 2305.14 and 1304.29 of the Revised Code.

[6] The two Ohio cases cited by the Kurinskys are *Bojac Corp. v. Kutevac*, 64 Ohio App.3d 368 (1990), and *Weethee v. Boso*, 64 Ohio App.3d 532 (1989). In *Bojac*,

this court is not bound by the Ohio court decisions, but ask us to revisit this issue in light of these cases. We note, however, that whatever merit there may be to the Kurinskys' argument only can be determined by this court sitting *en banc*. *See Salmi v. Secretary of Health & Human Servs.*, 774 F.2d 685, 689 (6th Cir. 1985)("A panel of this Court cannot overrule the decision of another panel."). Accordingly, the Kurinskys' only recourse on this claim is by way of *en banc* consideration.

The Kurinskys also ask us to apply 28 U.S.C. § 1658, a federally-enacted statute of limitations, to their *Bivens* claims. Section 1658 provides:

> Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues.

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the court observed:

> It is clear that appellants' claim under Section 1983 does not fit into any of the categories of R.C. 2305.10 through 2305.12. It must, therefore, fall within the general or residual statute for personal injury actions, which is R.C. 2305.09(D).

64 Ohio App.3d at 370.

This provision was enacted on December 1, 1990. Because the Kurinskys' claims do not arise under "an Act of Congress enacted after the date of the enactment of this section," we find no merit to this argument. Therefore, the district court did not err in dismissing counts V and VI of the Kurinskys' complaint.

REVERSED in part and AFFIRMED in part.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ANDREW C. KURINSKY JR., et al.,	)	Case No. 1:92CV2285
Plaintiffs	)	**MEMORANDUM AND ORDER**
vs.	)	
UNITED STATES OF AMERICA, et al.,	)	(Filed June 7, 1993)
Defendants.	)	

ALDRICH, J.

Andrew C. Kurinsky, Jr. and his wife, Donna A. Kurinsky, bring this action against the United States and twelve special agents of the Federal Bureau of Investigation (hereinafter "FBI agents"),[1] alleging violations of the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §2671 et seq., and the fourth and fifth amend-

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[1] The twelve agents are Joseph L. Ramsak, Linda T. Berry, William D. Hann, Barry Gummow, Bion St. Bernard, Kevin D. Burnett, Dan Elvem Estrem, Gary L. Hall, Albert L. McGinty, Jr., James M. Owens, Lance R. Sakurada, and James J. White.

ments to the United States Constitution. The United States and the FBI agents filed separate motions to dismiss.

For the reasons set forth below, the United States' motion to dismiss is granted.

I

The Kurinskys own and operate a business called Arcade Sound, which manufactures, repairs and distributes cable television equipment. Prior to March 1989, the FBI suspected that Andrew Kurinsky was violating 47 U.S.C. §553(a)(2), which prohibits the unauthorized reception of cable services, and was committing wire fraud (47 U.S.C. §1343). As a result, the FBI placed Kurinsky under surveillance. On March 27, 1989, based on information supplied by the FBI, Magistrate Judge Joseph W. Bartunek issued a search warrant for the Arcade Sound premises. On March 29, the FBI agents executed the search warrant and seized cable signal descramblers, cable television converters, assorted hardware, personal computers, numerous documents, and two handguns. According to the Kurinskys, no inventory of the seized goods was made while the property was removed, the property was mishandled and damaged, and common electronic components, which were not unique to the cable television industry, were taken. The United States claims that the property was returned to the Kurinskys between April 7, 1989

and October 4, 1990. The Kurinskys claim that not all of the property has been returned.

The Kurinskys filed this six-count action against the United States and the FBI agents, alleging damages stemming from the execution of the search warrant. Counts I, II and III are brought pursuant to the FTCA. Count IV alleges a violation of the due process clause of the fifth amendment, and counts V and VI are Bivens claims against the FBI agents, under the fourth and fifth amendments.

II.

The United States' Motion to Dismiss

A. Counts I, II and III

The FTCA provides that the United States shall be liable, to the same extent as a private party, "for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." 28 U.S.C. §1346(b). The FTCA's waiver of sovereign immunity is subject to a number of exceptions, outlined in 28 U.S.C. §2680(a)-(f), (h)-(n).

In the present case, the United States argues that counts I, II and III should be dismissed for two reasons. First, the United States asserts that the Kurinskys have failed to state a claim under the FTCA. Specifically, the United States claims that the Kurinskys have not described any negligent or wrongful act on the part

of any individual federal employee sufficient to impose liability on the United States. This Court disagrees. In Conley v. Gibson, 355 U.s. 41, 47 (1957), the United States Supreme Court held that:

> ... the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is "a short and plain statement of the claim" that will give the defendant fair notice of what plaintiff's claim is and the grounds upon which it rests.

This Court finds that the amended complaint satisfies the "notice pleading" requirement of Fed.R.Civ.P. 8(a)(2), and adequately states a claim against the United States.

Second, the United States argues that all of the FTCA claims are barred because 28 U.S.C. §2680(c) provides that the United States may not be sued for:

> (c) [a]ny claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law enforcement officer.

(Emphasis added.) The United States asserts that the FBI agents who executed the search warrant fall within

the "any other law enforcement officer" clause in §2680(c).

In order to rule on the United States' motion to dismiss, it is necessary for this Court to determine the intended scope of §2680(c). The United States Supreme Court has not yet addressed this precise issue. In Kosak v. United States, 465 U.S. 848, 852 n.6, 104 S.Ct. 1519, 79 L.Ed.2d 860 (1984), a case involving the seizure of an art collection by customs officials, the court wrote: "We have no occasion in this case to decide what kinds of 'law enforcement officer[s],' other than customs officials are covered by the exception."

Similarly, the Sixth Circuit has not addressed the scope of §2680(c), and district courts within the Sixth Circuit have reached different conclusions on this issue. For example, in Kelly v. United States, 630 F.Supp. 428 (W.D. Tenn. 1985), a federal prisoner brought an FTCA action, alleging that the Marshals Service negligently handled his property, which resulted in the loss of his diamond ring. The district court rejected the United States' argument that §2680(c) barred the action, ruling:

> Kosak dealt with the exception from coverage under §2680(c) of claims arising in respect of the detention of any goods or merchandise by the Customs Service. This case, of course, does not involve the Customs Service; rather, this lawsuit deals with the United States Marshals

> Service in the handling of the property of a prisoner. Accordingly, the exception in §2680(c) does not apply in this case.

Id. at 432.

However, in Great Lakes Zoological Society, Inc. v. United States, 1989 LEXIS 18186 (E.D. Mich. Nov. 30, 1989), a case involving the seizure and subsequent loss of 3000 turtles by the United States Fish and Wildlife Service, the district court held that the plaintiff's claim was barred because the special agents of the Fish and Wildlife Service were "law enforcement officers" within the meaning of § 2680(c).

In support of its motion to dismiss, the United States notes that the federal appellate courts that have interpreted § 2680(c) have uniformly applied the exception to law enforcement officials acting outside the customs or excise contexts. See Halverson v. United States, 972 F.2d 654, 655-56 (5th Cir.), cert. denied, ___ U.S. ___, 113 S. Ct. 1297, 122 L.Ed2d 687 (1992) (§ 2680(c) barred FTCA claim against Immigration and Naturalization Service for loss of property at immigration checkpoint); Schlaebitz v. United States Dep't of Justice, 924 F.2d 193, 194 (11th Cir. 1991) (§ 2680 barred claim against United States Marshals Service for seizure and damage to luggage at airport); Ysasi v. Rivkind, 856 F.2d 1520, 1524-25 (Fed.Cir. 1988) (§ 2680(c) barred claim against Immigration and

Naturalization Service border patrol for seizure of truck); Formula One Motors, Ltd. v. United States, 777 F.2d 822 (2d Cir. 1985) (§ 2680(c) applied to seizures by Food and Drug Administration agents);[2] United States v. 2,116 Boxes of Boned Beef, 726 F.2d 1481, 1490-91 (10th Cir.), cert. denied, sum nom., Jarboe-Lackey Feedlots, Inc. v. United States, 469 U.S. 825, 105 S. Ct. 105, 83 L.Ed.2d. 49 (1984) (§ 2680(c) barred claim

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[2] It must be noted that Formula One did not address the issue of whether § 2680(c) applied to all law enforcement officials acting in their official capacities. In Formula One, 777 F.2d 822 (2d Cir. 1985), the plaintiff imported an automobile into the United States. DEA agents seized the vehicle, disassembled it, and rendered it worthless. In affirming the district court's decision to dismiss the plaintiff's claim under § 2680(c), the Second Circuit ruled:

> [W]e are satisfied that the detention of the automobile and its search by the DEA agents fell within the scope of section 2680(c), without determining whether the exemption would apply to searches by law enforcement officers with no relationship to the customs of excise functions. . . . The seizure of an automobile still in transit from overseas and a search of that automobile for narcotics are sufficiently akin to the functions carried out by Customs Officials to place the agents' conduct within the scope of section 2680(c).

Id. at 823-24 (emphasis added).

against United States Department of Agriculture for seizure of beef); United States v. $149,345 United States Currency, 747 F.2d 1278, 1283 (9th Cir. 1984) (§ 2680(c) barred claim against federal narcotics agents, who seized currency after they obtained suspect's permission to search his briefcase at airport); United States v. Lockheed L-188 Aircraft, 656 F.2d 390 (9th Cir. 1979) (§ 2680(c) barred claim against Federal Aviation Administration for seizure of aircraft); United States v. 1500 Cases, More or Less, 249 F.2d 382 (7th Cir. 1957) (§ 2680(c) applied to seizure by Food and Drug Administration agents).

In response, the Kurinskys argue that § 2680(c) does not apply to detentions by law enforcement officers who are not acting in aid of the enforcement of customs or tax laws. In support, the Kurinskys rely on the concurring opinions of Judge Tang, in A-Mark, Inc. v. United States Secret Service, 593 F.2d 849, 850-51 (9th Cir. 1978), and Judge Oakes, in Formula One, 777 F.2d at 825, which discuss the scope of § 2860(c).

In A-Mark, Judge Tang noted that:

> [t]he governmental function of assessing and collecting customs duties necessarily requires some period of detention when the imported item is inspected for purposes of evaluation. A similar situation often arises when property must be levied against for tax purposes. It

> follows that where the ultimate act of assessing the tax or duty is rendered exempt, the incidental activity of detention must also be protected. § 2680(c) contains parallel clauses which cover "the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer." (emphasis added). The clauses both dwell exclusively on customs and taxes, except for the final reference to other law-enforcement officers. The "any other law-enforcement officer" phrase should be viewed as Congress' recognition of the fact that federal officers, other than customs and excise officers, sometimes become involved in the activity of detaining goods for tax or customs purposes.

593 F.2d at 850-51.

In a concurring opinion in Formula One, Judge Oakes observed that the plain language of § 2680(c) and the legislative history provided support for Judge Tang's position in A-Mark. Judge Oakes concluded that:

> [W]here no nexus exists between customs activity and the act complained of, I would hold that § 2680(c) does not bar recovery. Otherwise, the detention exception ... precludes a broader spectrum of suits to redress injury to

> property inflicted by federal law enforcement officers, whenever and wherever they are acting, than I believe Congress ever intended.

777 F.2d at 825. See also Hydrogen Technology Corp. v. United States, 656 F. Supp. 1126, 1128 (D. Mass), aff'd on other grounds, 831 F.2d 1155 (1st Cir. 1987), cert. denied, 485 U.S. 1022, 108 S. Ct. 1995, 100 L.Ed2d 227 (1988) (district court adopted Judge Oakes' view that § 2680(c) did not apply outside the customs or excise contexts).

This Court has reviewed the cases cited by both parties, and finds the United States' interpretation of § 2680(c) to be persuasive. First, this Court finds that the legislative history of § 2680(c) sheds little, if any, light on the intended scope of the exception. Second, all of the federal appellate courts that have considered § 2680(c) have concluded that the exception applied to claims involving law enforcement officers, other than customs and tax agents, performing their proper duties.[3] Third, Judge Tang's argument in A-Mark in favor of a

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[3] While this Court recognizes that a number of the appellate cases cited by the United States involved law enforcement activities which, like the activities in Formula One, were sufficiently akin to the functions of customs officials, to fall within the interpretation of § 2680(c) endorsed by Judges Tang and Oakes, the fact remains that no federal Circuit Court has adopted such a narrow interpretation of § 2680(c).

narrow reading of § 2680(c) was rejected by the Ninth Circuit Court of Appeals. See Gifford v. United States, 967 F.2d 586 (9th Cir. 1992) (Table) (published on 1992 U.S. App. LEXIS 13976) (§ 2680(c) barred claim against Bureau of Land Management for seizure of property); Lockheed, 656 F.2d at 397. Therefore, this Court holds that § 2680(c) is applicable to the present case.

The Kurinskys also argue that § 2680(c) does not apply to damages resulting from negligence occurring in the course of the seizure, as distinguished from the detention, of the Kurinskys' property. While the plain language of § 2680(c) only discusses detention, the Kurinskys fail to cite any authority to support their interpretation of § 2680(c). Moreover, under the Kurinskys' reading of the exception, the United States could be sued for damage caused by a customs or tax agent during the seizure of property, but not the subsequent detention of property. Such a result is illogical. Therefore, this Court finds that § 2680(c) applies to any property damage resulting from the seizure and detention of property by federal law enforcement officials.

Finally, the Kurinskys claim that damages resulting from the negligent infliction of emotional distress or abuse of process are not barred. Given the fact that § 2680(c) is subject to broad interpretation, see Kosak, 465 U.S. at 853-54, this Court finds that § 2680(c) covers all injuries arising from the United States'

detention of property, including those injuries based on state law tort theories. The Kurinskys' state law claims are barred because the United States has not waived its sovereign immunity to be sued.

In sum, the United States' motion to dismiss counts I, II and III is granted.

B. Count IV

In count IV of the complaint, the Kurinskys seek damages against the United States for the taking of their property in violation of the due process clause of the fifth amendment. See Complaint, para. 36. In its motion to dismiss, the United States correctly points out that a Bivens-type action based on a constitutional tort may not be brought against the United States where the United States has not waived its sovereign immunity and consented to be sued. In Bivens v. Six Unknown Names Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 410, 91 S. Ct. 1999, 29 L.Ed.2d 619 (1971), Justice Harlan noted, in concurrence, that: "[h]owever desirable a direct remedy against the Government might be as a substitute for individual official liability, the sovereign remains immune from suit."

This Court grants the United States' motion to dismiss count IV of the complaint.

The FBI Agents' Motion to Dismiss

The FBI agents argue that counts V and VI should be dismissed because: (1) the statute of limitations has run on the Bivens claims against the FBI agents; (2) the complaint fails to state a cognizable claim for relief against the FBI agents because the search was based on probable cause; (3) the existence of an adequate post-deprivation remedy precludes the fifth amendment claim for damages against the FBI agents; and (4) the FBI agents are protected by qualified immunity because their conduct did not violate clearly established constitutional rights.

This Court finds that the FBI agents' motion to dismiss is well taken because this action was brought after the statute of limitations had run on the Bivens claims.[4] In Wilson v. Garcia, 471 U.S. 261, 105 S. Ct. 1938, 85 L.Ed.2d 254 (1985), the United States Supreme Court held that a state's personal injury statute of limitations is the statute to be applied to a 42 U.S.C§ 1983 claim. In 1989, the Supreme Court noted that where a state has multiple statutes of limitation for personal injury actions, a § 1983 action should be governed by the "general or residual statute for personal injury actions." Owens v. Okure, 488 U.S. 235, 109 S. Ct. 573, 102 L.Ed.2d 594 (1989). In Browning v.

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[4] Given this finding, this Court does not address the FBI agents' other arguments in favor of dismissal.

Pendleton, 869 F.2d 989, 990 (6th Cir. 1989), the Sixth Circuit held that in Ohio, Ohio Rev. Code § 2305.10, which provides for a two year statute of limitations, governs § 1983 actions.

Since Bivens actions against federal employees are analogous to § 1983 actions against state actors, see McSurely v. Hutchinson, 823 F.2d 1002, 1004-05 (6th Cir. 1987), cert. denied, 485 U.S. 934 (1988), the Sixth Circuit, in Friedman v. Estate of Presser, 929 F.2d 1151, 1158-59 (6th Cir. 1991), held that the relevant Ohio statute of limitations for Bivens actions was also two years (Ohio Rev. Code § 2305.10). This limitations period begins to run when a person knew or should have known of the injury which forms the basis of her claim.[5] Id. at 1159; see also Sevier v. Turner, 742 F.2d 262, 273 (6th Cir. 1984).

In the present case, the search warrant was obtained on March 27, 1989, and was executed on March 29, 1989. Therefore the Kurinskys knew of the alleged constitutional deprivation at that time. This action was filed on October 29, 1992, well outside the two year period for bringing a Bivens action.

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[5] Given this rule, the Kurinskys' argument that the statute of limitations has not yet begun to run because they are being subjected to a continuing constitutional deprivation is meritless. See Plaintiffs' Brief in Opposition to Motion of Individual Defendants to Dismiss, at 18 n.4.

In opposition the motion to dismiss, the Kurinskys argue that the Sixth Circuit misapplied the rule set forth in Owens in determining which of Ohio's multiple personal injury statutes of limitation should be applied to Bivens actions. Specifically, the Kurinskys assert that the appropriate statute of limitations for Bivens actions is four years, as stated in Ohio Rev. Code § 2305.09(D). However, this argument is unpersuasive given the fact that the Sixth Circuit, in Hull v. Cuyahoga Valley Bd. of Educ., 926 F.2d 505 (6th Cir. 1991), cert. denied, Hull v. Schuck, ___ U.S. ___, 111 S. Ct. 2917, 115 L.Ed.2d 1080 (1992), declined to apply § 2305.09(D) to § 1983 actions.

While the Court recognizes that the reliance on a state's statute of limitations for Bivens claims results in inconsistent, and often discriminatory, treatment of plaintiffs in different states, the current state of the law in the Sixth Circuit, as stated in Friedman, is clear. Because the Kurinsky failed to file this suit against the FBI agents within the two year limitations period for Bivens actions, this Court granted the FBI agents' motion to dismiss.

IV

In sum, this Court grants the United States' motion to dismiss counts I, II, III, and IV, and finds that the Kurinskys' claims against the individual FBI agents (counts V & VI) are barred by the applicable statute of

limitations. Therefore, this action is dismissed in its entirety, with prejudice.

IT IS SO ORDERED.

/s/Ann Aldrich
ANN ALDRICH
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ANDREW C. KURINSKY JR., et al.,	)	Case No. 1:92CV2285
Plaintiffs	)	**ORDER**
vs.	)	(Filed June 7, 1993)
UNITED STATES OF AMERICA, et al.,	)	
Defendants.	)	

ALDRICH, J.

The Court has filed its memorandum and order granting the United States' motion to dismiss counts I, II, III, and IV; and finding that counts V and VI are barred by the applicable statute of limitations; therefore,

IT IS ORDERED that final judgment is entered in favor of the defendants; and the case is dismissed, with prejudice.

IT IS FURTHER ORDERED that this judgment is final and appealable.

/s/Ann Aldrich
ANN ALDRICH
UNITED STATES DISTRICT JUDGE

No. 93-3886

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ANDREW C. KURINSKY, JR., ET AL.,	)	
Plaintiffs-Appellants,	)	
vs.	)	ORDER (Filed November 1, 1994)
UNITED STATES OF AMERICA, ET AL.,	)	
Defendants-Appelles.	)	

BEFORE: CONTE, GUY, and BOGGS, Circuit Judges.

The court having received two petitions for rehearing en banc, and the petitions having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petitions for rehearing have been referred to the original hearing panel.

The panel has further reviewed the petitions for rehearing and concludes that the issues raised in the petitions were fully considered upon the original submission and decision of the case. Accordingly, the petitions are denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green

Leonard Green, Clerk

UNITED STATES CODE

28 U.S.C. § 1658. Time limitations on the commencement of civil actions arising under Acts of Congress

Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues.

UNITED STATES CODE

42 U.S.C. § 1988. Proceedings in vindication of civil rights; attorney's fees; expert fees.

(a) Applicability of statutory and common law

The jurisdiction of civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

(b) Attorney's fees

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985 and 1986 of

this title, title IX of Public Law 92-318, the Religious Freedom Restoration Act of 1993, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

(c) Expert fees

In awarding an attorney's fee under subsection (b) of this section in any action or proceeding to enforce a provision of section 1981 or 1981a of this title, the court, in its discretion, may include expert fees as part of the attorney's fee.

OHIO REVISED CODE

§ 2305.09 Four years; certain torts.

An action for any of the following causes shall be brought within four years after the cause thereof accrued:

(A) For trespassing upon real property;

(B) For the recovery of personal property, or for taking or detaining it;

(C) For relief on the ground of fraud;

(D) For an injury to the rights of the plaintiff not arising on contract nor numerated in sections 2305.10 to 2305.12, inclusive, 2305.14 and 1304.29 of the Revised Code.

If the action is for trespassing under ground or injury to mines, or for the wrongful taking of personal property, the causes thereof shall not accrue until the wrongdoer is discovered; nor, if it is for fraud, until the fraud is discovered.

OHIO REVISED CODE

§ 2305.10 Bodily injury or injury to personal property.

An action for bodily injury or injuring personal property shall be brought within two years after the cause thereof arose.

For purposes of this section, a cause of action for bodily injury caused by exposure to asbestos or to chromium in any of its chemical forms arises upon the date on which the plaintiff is informed by competent medical authority that he has been injured by such exposure, or upon the date on which, by the exercise of reasonable diligence, he should have become aware that he had been injured by the exposure, whichever date occurs first.

For purposes of this section, a cause of action for bodily injury incurred by a veteran through exposure to chemical defoliants or herbicides or other causative agents, including agent orange, arises upon the date on which the plaintiff is informed by competent medical authority that he has been injured by such exposure.

As used in this section, "agent orange," "causative agent," and "veteran" have the same meanings as in section 5903.21 of the Revised Code.

For purposes of this section, a cause of action for bodily injury which may be caused by exposure to diethylstilbestrol or other nonsteroidal synthetic estrogens, including exposure before birth, arises upon

the date on which the plaintiff learns from a licensed physician that he has an injury which may be related to such exposure, or upon the date on which by the exercise of reasonable diligence he should have become aware that he has an injury which may be related to such exposure, whichever date occurs first.

Supreme Court, U.S.
FILED
APR 3 1995
OFFICE OF THE CLERK

No. 94-1284

In the Supreme Court of the United States

OCTOBER TERM, 1994

ANDREW C. KURINSKY, JR., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether state statutes of limitations apply to claims made pursuant to *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

2. If state statutes of limitations apply to *Bivens* claims, whether the court of appeals correctly held that the two-year limitation period provided by Ohio Revised Code § 2305.10 (1991) for "[a]n action for bodily injury or injuring personal property" applies to petitioners' claims.

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-1284

ANDREW C. KURINSKY, JR., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A16) is reported at 33 F.3d 594. The opinion of the district court (Pet. App. A17-A32) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 26, 1994. Petitions for rehearing were denied on November 1, 1994. Pet. App. A34-A35. The petition for a writ of certiorari was filed on

January 27, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case arises out of a federal investigation into suspected wire fraud and other criminal violations by petitioner Andrew Kurinsky. The Kurinsky family owns and operates a business that manufactures, repairs, and distributes cable television and other electronic equipment. Pet. App. A2-A3. The FBI suspected petitioner Andrew Kurinsky of committing wire fraud in violation of 18 U.S.C. 1343, and of modifying and distributing cable equipment in violation of 47 U.S.C. 553(*a*)(2), which prohibits the sale of equipment intended to promote the unauthorized reception of cable services. On March 29, 1989, the FBI searched petitioners' business premises pursuant to a valid search warrant and seized cable and other electronic equipment, computers, documents, and handguns. The government returned the seized material between April, 1989, and August, 1990. See Pet. App. A3.

On October 29, 1992, petitioners filed suit against the United States and twelve individual FBI agents for damages arising out of the search. Pet. App. A3, A17. They alleged that the United States had negligently damaged their property and had deprived them of their property without due process in violation of the Fifth Amendment. They also sought damages against the individual federal agents under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), contending that the agents had violated their Fourth and Fifth Amendment rights in the conduct of the search. See Pet. 8, 9.

The district court dismissed the *Bivens* claims against the individual defendants as time-barred. Pet. App. A29-A31.[1] The district court followed the Sixth Circuit's decision in *Friedman* v. *Estate of Presser*, 929 F.2d 1151, 1158-1159 (1991), in which the court of appeals held that the relevant statute of limitations for *Bivens* actions in Ohio is the two-year limitation period in Ohio Revised Code § 2305.10 (1991), the limitation period also applicable to damages actions brought against state actors under 42 U.S.C. 1983. Pet. App. A30.

The court of appeals affirmed the dismissal of the *Bivens* claims. Pet. App. A13-A16. The court observed that, in prior decisions, it had held that *Bivens* actions should be governed by the same statute of limitations as applies to actions under 42 U.S.C. 1983, and that the two-year period in Ohio Revised Code § 2305.10 (1991) governs actions under 42 U.S.C. 1983. Pet. App. A13-A14. Thus, the court held, "it follows, as this court recently observed in *Friedman* * * * [that] the relevant Ohio statute of limitations for *Bivens* actions is two years." *Id.* at A14.

In both the district court and the court of appeals, petitioners urged application of the four-year limitation period in Ohio Revised Code § 2305.09 (1991), and contended that Ohio state appellate courts had

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[1] The district court also dismissed petitioners' claims against the United States. Pet. App. A28. The court of appeals subsequently reversed the dismissal of the claims based on negligence, which were brought under the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.* (see Pet. App. A12-A13), but affirmed the dismissal of the claim based on the Due Process Clause itself (see *id.* at A13). Petitioners do not renew their due process claim against the United States in this Court.

applied that four-year period to actions under 42 U.S.C. 1983. The court of appeals nevertheless found its prior decisions to be controlling and indicated that petitioners' recourse was to seek en banc review. Pet. App. A14-A15. The court also rejected petitioners' argument for application of the four-year limitation period in 28 U.S.C. 1658 (Supp. V 1993) for "civil action[s] arising under an Act of Congress enacted after the date of the enactment of this section [December 1, 1990]," holding that Section 1658 plainly does not encompass *Bivens* actions. Pet. App. A15-A16. The court subsequently denied petitioners' request for rehearing en banc. *Id.* at A34-A35.

ARGUMENT

The court of appeals correctly concluded that petitioners' *Bivens* actions should be governed by the state statute of limitations applicable to actions under 42 U.S.C. 1983. That conclusion is consistent with the decisions of every court of appeals that has addressed statutes of limitations for *Bivens* actions. The court also employed the correct analysis in concluding that the applicable state statute of limitations was Ohio Revised Code § 2305.10 (1991).

1. Petitioners allege a cause of action for damages under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), which "established that the victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right," *Carlson* v. *Green*, 446 U.S. 14, 18 (1980). Neither the Constitution nor any federal statute specifies a limitation period for *Bivens* actions, and the Court has never determined what stat-

utes of limitations apply to such actions. The Court has, however, addressed the appropriate statute of limitations to apply to constitutional claims against state actors under 42 U.S.C. 1983, which also lacks an express limitation period. In *Wilson* v. *Garcia*, 471 U.S. 261 (1985), the Court noted that a lack of an express statute of limitations is "a void which is commonplace in federal statutory law," *id.* at 266, and observed that the "settled practice" in such situations "has been to adopt a local time limitation as federal law if it is not inconsistent with federal law or policy to do so," *id.* at 266-267. The Court thus directed lower courts to borrow the most analogous limitation period under state law, the statute of limitations for personal injury actions. *Id.* at 276-280; see *Owens* v. *Okure*, 488 U.S. 235, 249 (1989); see also *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 661-662 (1987) (same for actions under 42 U.S.C. 1981).

As the Ninth Circuit has observed, "[a]ctions under § 1983 and those under *Bivens* are identical save for the replacement of a state actor under § 1983 by a federal actor under *Bivens*." *Van Strum* v. *Lawn*, 940 F.2d 406, 409 (9th Cir. 1991); see also *Bieneman* v. *Chicago*, 864 F.2d 463, 469 (7th Cir. 1988), cert. denied, 490 U.S. 1080 (1989). Both *Bivens* actions and Section 1983 actions are designed to provide redress for constitutional violations, and the same immunity standards apply in both kinds of actions. *Butz* v. *Economou*, 438 U.S. 478, 500-501 (1978). In light of those similarities, every court of appeals that has considered the issue has concluded that the statute of limitations for claims brought under 42 U.S.C. 1983 applies also to *Bivens* claims. See *McSurely* v. *Hutchison*, 823 F.2d 1002,

1005-1006 (6th Cir. 1987), cert. denied, 485 U.S. 934 (1988); *Van Strum* v. *Lawn*, 940 F.2d at 410; *Bieneman* v. *Chicago*, 864 F.2d at 469-470; *Chin* v. *Bowen*, 833 F.2d 21, 23-24 (2d Cir. 1987).

Petitioners argue (Pet. 12-13) that state statutes of limitations apply to Section 1983 actions only by virtue of 42 U.S.C. 1988 (1988 & Supp. V 1993), which directs the courts to apply, to civil rights cases, "the common law, as modified and changed by the constitution and statutes of the State * * *, so far as the same is not inconsistent with the Constitution and laws of the United States." Petitioners reason that, because the *Bivens* remedy is judicially created rather than statutory, the directive of Section 1988 does not apply. Pet. 13. In *Wilson* v. *Garcia*, however, the Court indicated that Section 1988 only confirmed that the "settled practice" of borrowing statutes of limitations from state law should apply to civil rights cases as well. 471 U.S. at 266-267 & n.12; see also *Owens* v. *Okure*, 488 U.S. at 239 (Section 1988 "endorses" the borrowing of state-law limitations provisions). The courts of appeals have also agreed that the decision in *Wilson* "d[id] not depend on § 1988. Nothing in the text or history of that statute speaks to the questio[n]." *Bieneman* v. *Chicago*, 864 F.2d at 469; see also *Van Strum* v. *Lawn*, 940 F.2d at 409 (*Wilson* rested "on the *imputation* of purposes to the 1871 Congress that enacted §§ 1983 and 1988 based on practical concerns about judicial administration of that statute").

Petitioners invoke concerns about the need for uniformity in the *Bivens* remedy, which is a creation of federal law, and they rely on *Carlson* v. *Green*, 446 U.S. 14, 23-25 (1980), in which the Court concluded that a uniform federal rule of survival for

Bivens actions was necessary "for complete vindication of constitutional rights," *id.* at 24. See Pet. 15-17. Nothing in *Carlson*, however, is inconsistent with the borrowing of state statutes of limitations. In *Carlson*, it was alleged that the plaintiff's decedent died as a result of unconstitutional actions by federal prison officials. 446 U.S. at 16. Had the cause of action not survived the victim's death, there would have been no remedy for the deprivation of constitutional rights. In such a situation, it was clear that a state survivorship law abating a cause of action on the death of the victim would be inconsistent with federal policy. See *id.* at 24; cf. *Wilson* v. *Garcia*, 471 U.S. at 266-267 (state law should be borrowed to fill federal gap where "it is not inconsistent with federal law or policy to do so"). *Carlson* did not mandate uniform rules to govern all aspects of *Bivens* litigation; indeed, it expressly left open whether federal law should incorporate state rules on other survivorship issues for *Bivens* claims. 446 U.S. at 25 n.11.

The federal interest in uniformity and certainty of statutes of limitations for *Bivens* actions is adequately served by the courts' practice of borrowing only one statute of limitations for each State. See *Wilson*, 471 U.S. at 272, 275. That practice ensures that every plaintiff bringing a *Bivens* action within a particular State will know the applicable limitation period. In *Bivens* actions, as under Section 1983, "the need for national uniformity 'has not been held to warrant the displacement of state statutes of limitations,' " *Wilson*, 471 U.S. at 275, and the federal interest in avoiding unnecessary litigation over a time bar supports the practice of borrowing one, and only one, statute of limitations for each State. Con-

gruence among Section 1983 and *Bivens* actions on the limitation issue also makes it "an uncomplicated task for judges, lawyers, and litigants [to ascertain the proper statute], rather than a source of uncertainty, and unproductive and ever-increasing litigation." *Ibid.*

Finally, petitioners rely (Pet. 13) on 28 U.S.C. 1658 (Supp. V 1993), which provides that "a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues." By its own terms, 28 U.S.C. 1658 has no application to *Bivens* actions, which do not arise under an Act of Congress. Petitioners argue, however, that Section 1658 represents a "national policy" in favor of a four-year limitations period for federal actions that otherwise lack a statute of limitations. *Ibid.* But when Congress enacted Section 1658 in 1990, it was well aware of the existence of *Bivens* actions and of the courts' well settled practice of borrowing state statutes of limitations for such actions. Congress could have easily directed that *Bivens* actions be governed by Section 1658, had it desired that result. Instead, it left undisturbed the practice of borrowing state law unless that law is inconsistent with federal law or policy.

2. Petitioners argue (Pet. 18-28) that, even if the same state statute of limitations applies to both Section 1983 and *Bivens* actions, the courts below applied the wrong statute of limitations. In *Owens* v. *Okure*, this Court held that, where state law provides multiple statutes of limitations for personal injury actions, courts should borrow the state's general or residual statute of limitations for personal injuries. 488 U.S. at 249-250. The Court characterized a gen-

eral provision as one "which applies to all personal injury actions with certain specific exceptions," *id.* at 246, and a residual provision as one "which applies to all actions not specifically provided for, including personal injury actions." *Id.* at 246-247.

Thus, *Owens* v. *Okure* mandates that courts select the state statute of limitations that, of those available, best fits within the category of general or residual statutes of limitations for personal injuries. That determination will necessarily vary from State to State, depending on the wording of state statutes. In 1989, the Sixth Circuit, sitting en banc, concluded that the appropriate limitations period for Section 1983 claims is found in Ohio Revised Code § 2305.10 (1991), which provides that "[a]n action for bodily injury or injuring personal property shall be brought within two years after the cause thereof arose." *Browning* v. *Pendleton*, 869 F.2d 989, 992 (6th Cir. 1989).[2]

Petitioners argue (Pet. 21-22) that the appropriate statute of limitations is in fact the four-year limitations period in Ohio Revised Code § 2305.09 (D) (1991), "[f]or an injury to the rights of the plaintiff not arising on contract nor enumerated in sections 2305.10 to 2305.12 * * * of the Revised Code." The Sixth Circuit has concluded, however,

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[2] Contrary to petitioners' contentions (Pet. 22-24), *Van Strum* v. *Lawn*, 940 F.2d 406 (9th Cir. 1991), *Lounsbury* v. *Jeffries*, 25 F.3d 131 (2d Cir. 1994), and *Gray* v. *Lacke*, 885 F.2d 399 (7th Cir. 1989), cert. denied, 494 U.S. 1029 (1990), do not conflict with *Browning* or the decision below. In each case, the statute of limitations was chosen from the array of possible state-law provisions, in light of the interpretations placed on them by the court of appeals. The courts of appeals all recognize that *Wilson* and *Owens* require reference to the residual or general statute of limitations for personal injuries.

that Section 2305.09(D) does not provide the appropriate limitation period, reasoning that that section is not a residual *personal injury* statute of limitations, but rather a residual, or catch-all, statute of limitations applicable to all causes of action not otherwise covered by a statute of limitations. See *McSurely* v. *Hutchison*, 823 F.2d at 1005-1006; *Mulligan* v. *Hazard*, 777 F.2d 340, 343 n.4 (6th Cir. 1985), cert. denied, 476 U.S. 1174 (1986), overruled on other grounds, *Browning* v. *Pendleton*, 869 F.2d 989, 992 (6th Cir. 1989) (en banc).[3] This Court has specifically disapproved the use of such a catch-all limitation period unless it embraces, "either explicitly or by judicial construction, unspecified personal injury actions," *Owens*, 488 U.S. at 250 n.12; *Wilson*, 471 U.S. at 278, as the Sixth Circuit recognized in *Mulligan*, *supra*.

Petitioners note (Pet. 24-27), that some Ohio state courts have characterized Section 2305.09(D) as the State's general or residual personal injury statute of limitations and have applied that statute of limitations to state-court actions brought under 42 U.S.C. 1983.[4] As this Court made clear in *Wilson* v. *Garcia*,

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[3] In *Mulligan*, the Sixth Circuit applied Ohio's one-year statute of limitations for intentional torts, Ohio Rev. Code § 2305.11 (1991), to a Section 1983 action. That choice was disapproved by *Owens* v. *Okure*, which rejected the analogy of intentional torts for Section 1983 cases. 488 U.S. at 242-244. The remainder of the *Mulligan* court's reasoning, that the catch-all statute of limitations should not be borrowed, survived *Owens*, and indeed was reaffirmed in it.

[4] The Ohio Court of Appeals for Franklin County concluded in *Weethee* v. *Boso*, 582 N.E.2d 19, 21 (1989), motion to certify the record overruled, 550 N.E.2d 482 (Ohio 1990), that the four-year period in Section 2305.09(D), was appli-

however, the appropriate limitation period for Section 1983 actions, even if borrowed from state law, "is ultimately a question of federal law." 471 U.S. at 269-270. "Even when principles of state law are borrowed to assist in the enforcement of this federal remedy, the state rule is adopted as 'a federal rule responsive to the need whenever a federal right is impaired.'" *Id.* at 269; see also *Gray* v. *Lacke*, 885 F.2d 399, 409 (7th Cir. 1989) (declining to adopt statute of limitations applied by Wisconsin state courts to Section 1983 actions).

In concluding that Section 2305.10 was the appropriate statute of limitations for Section 1983 and *Bivens* actions, the Sixth Circuit faithfully applied this Court's precedents in *Wilson* and *Owens*. If the Sixth Circuit has erred in selecting Ohio's residual personal injury statute of limitations through application of those precedents, that error raises no issue of general importance calling for this Court's review.[5]

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cable to a Section 1983 claim. The Court of Appeals for Trumbull County arrived at the same conclusion in *Bojac Corporation* v. *Kutevac*, 581 N.E.2d 625, 627 (1990), as did the Court of Appeals for Marion County in *Martin* v. *Adult Parole Authority*, No. 9-93-45 (Mar. 4, 1994), motion to certify the record overruled, 635 N.E.2d 43 (Ohio 1994). The Ohio Supreme Court has not ruled on the issue, although in *Yaklevich* v. *Kemp, Schaeffer & Rowe Co.*, 626 N.E.2d 115, 120 (Ohio 1994), it held that the four-year period in Section 2305.09(D) was applicable to the tort of abuse of process.

[5] Petitioners cannot claim to have been surprised by the lower courts' decisions that their claim was time-barred. The Sixth Circuit decided on July 24, 1987, in *McSurely*, 823 F.2d at 1005, that the statutes of limitations for Section 1983 actions and *Bivens* actions are the same. It decided on March 16, 1989, in *Browning*, 869 F.2d at 992, that the limitation

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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period in Ohio for Section 1983 claims was two years. Both of those cases were decided before the date of the search in this case, March 29, 1989.

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